

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number: _____

Meeting Type: Regular

Meeting Date: Dec 18, 2014

Action Requested By: _____

Agenda Type: Resolution

Subject Matter:

Resolution consenting to the approval of settlement agreement in Dawson Building Contractors lawsuits.

Exact Wording for the Agenda:

Resolution consenting to the approval of a settlement agreement between the Public Building Authority and Dawson Building Contractors, Inc.

Note: If amendment, Please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost: _____

Budgeted Item: Not Applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head:  _____

Date: Dec 18, 2014

RESOLUTION NO. 2014-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and he is hereby, authorized to execute that Settlement Agreement (for the sole purpose of evidencing the City of Huntsville's consent to, and approval of, the Settlement Agreement) by and between the Public Building Authority of the City of Huntsville, Alabama, and Dawson Building Contractors, Inc., which said Agreement is substantially in words and figures similar to that certain document attached hereto and identified as "Pro Tanto Settlement Agreement and Mutual Release," consisting of thirteen (13) pages, with the date of December 18, 2014, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council. An executed copy of said document, after being signed by the Mayor, shall be permanently kept on file in the Office of the City-Clerk Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 18th day of December, 2014.

President of the City Council of
the City of Huntsville, Alabama

APPROVED this the 18th day of December, 2014.

Mayor of the City of Huntsville,
Alabama

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

DAWSON BUILDING CONTRACTORS,)
INC.,)

Plaintiff,)

v.)

Civil Action No.: 2006-1887-DSP

THE PUBLIC BUILDING AUTHORITY OF)
THE CITY OF HUNTSVILLE, ALABAMA,)
et al.,)

Defendants.)

Consolidated With

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

THE PUBLIC BUILDING AUTHORITY OF)
THE CITY OF HUNTSVILLE, ALABAMA,)

Plaintiff,)

v.)

Civil Action No.: 2006-1943-KKH

DAWSON BUILDING CONTRACTORS,)
INC., *et al.*,)

Defendants.)

PRO TANTO SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into by and between the Public Building Authority of the City of Huntsville, Alabama, and the City of Huntsville, Alabama (collectively "PBA"), and Dawson Building Contractors, Inc. ("Dawson") (collectively referred to as the "Parties").

RECITALS

A. WHEREAS, Dawson contracted with the PBA to perform work on the Huntsville/Madison County Jail Annex located in Huntsville, Alabama (the "Project"); and

President of the City Council of the
City of Huntsville, Alabama
Date: _____

B. WHEREAS, there were various problems, issues and delays allegedly involved with the construction of the Project; and

C. WHEREAS, during the course of construction on the Project, the PBA informed Dawson of its decision to execute a Termination for Convenience ("TfC"); and

D. WHEREAS, a dispute has arisen between the PBA and Dawson wherein the PBA has alleged that construction performed on Dawson's behalf was defective; and

E. WHEREAS, the PBA has asserted that it suffered damages totaling multiple millions of dollars related to construction defects; and

F. WHEREAS, Dawson alleges it incurred multiple millions of dollars in damages caused by the PBA's TfC; and

G. WHEREAS, there have been multiple suits filed between the PBA and Dawson, including claims variously styled Dawson v. The Public Building Authority of the City of Huntsville, Alabama, Case No. CV-2006-1887, consolidated with Public Building Authority v. Dawson Building Contractors, Inc., Case No. CV-2006-1943 (referred to herein as the "Suits"); and

H. WHEREAS, Dawson has maintained indemnity and other claims and the PBA has maintained various claims against various subcontractors and other professionals involved in the Project and the Parties have agreed to establish a fund (hereinafter referred to as the "Fund") into which the settlements or judgments obtained or to be obtained from all subcontractors, design professionals, and the insurers of the subcontractors or design professionals shall be deposited to be held in trust until disbursed as outlined below; and

I. WHEREAS, the amount remaining in the Fund after payments, if any, to each subcontractor or design professional, consistent with paragraph Q below, shall be considered the Net Recovery; and

J. WHEREAS, the PBA and Dawson have reached agreements with some of the subcontractors or design professionals and their insurers (“Settled Party” or “Settled Parties”) before or at the same time as this Agreement was reached; and

K. WHEREAS, despite Dawson’s prosecution of the TfC claims, the PBA refuses to pay Dawson related to the work of certain subcontractors who are not presently parties in this matter but who submitted information in support of the TfC claim submitted by Dawson (“Contested Subcontractors”) and for claims related to the work done by other subcontractors, already parties to the Suits (“Party Subcontractors”), due to the PBA’s allegations and claims related to those Contested Subcontractors’ and Party Subcontractors’ work. Consequently, no payment to Dawson from any of the Settled Parties, their insurers, or the Fund constitutes payment to Dawson for any claims asserted by Dawson in the Suits on behalf of Contested Subcontractors or Party Subcontractors, or for the Contested Subcontractors’ or Party Subcontractors’ labor or materials; and

L. WHEREAS, in addition to the payments referenced in paragraphs N and O, Dawson is due to be paid \$400,000 from the PBA’s portion of the Fund for various costs associated with litigation, including costs associated with expertise provided by Dawson employees related to document collection and costs, fees and expenses related to mediations that have taken place, and to cover the cost of mediations that might take place; and

M. WHEREAS, the PBA and Dawson will each be responsible for their own attorneys' fees and costs related to the Suits beyond those that may be recovered via the Fund; and

N. WHEREAS, the first \$2.3 million in Net Recovery from the Settled Parties represents payments to be made to Dawson as set forth below and will be distributed from the Fund to Dawson; and

O. WHEREAS, any and all monies in the Fund in excess of the first \$2.3 million of the Net Recovery will be split equally from the Fund between the PBA and Dawson; and

P. WHEREAS, PBA intends to prosecute its claims against the remaining defendants in the Suits, and Dawson intends to pursue its claims, including its claims for indemnity, against all responsible parties with whom no settlement has been reached; the PBA and Dawson shall each be responsible for their own attorneys' fees, costs, and expenses in pursuing their claims; and

Q. WHEREAS, the Fund shall not be reduced in any instance in which the net result from a particular dispute with an entity not a party to this Agreement and its insurer(s) is a negative value; and

R. WHEREAS, payments to Dawson from the Fund, unless otherwise agreed to by the PBA and Dawson, shall be allocated, as follows: (1) for recovery of Dawson's claims against Zurich as Dawson's insurer; (2) for certain TFC claims by the Settled Parties asserted via Dawson; (3) for Dawson's attorneys' fees and costs associated with prosecuting Settled Parties' claims; (4) for Dawson's own direct claims related to the TFC (excluding claims brought on behalf of Contested Subcontractors, or claims submitted by Contested Subcontractors to Dawson for submission to the PBA for alleged amounts owed, or for labor or materials provided by

Contested Subcontractors), including interest; and (5) for consequential and other damages to Dawson related to the Project; and

S. WHEREAS, all monies in the Fund shall be disbursed as soon as possible after receipt; and each disbursement from the Fund will be accompanied by an agreed-upon accounting of the Fund;

RELEASE

NOW THEREFORE, in consideration of the covenants, recital and promises set forth herein, the receipt and adequacy of which is hereby acknowledged by the Parties to this Agreement, the Parties hereby agree as follows:

1. Paragraphs A through S of this Agreement set forth above as Recitals are incorporated by reference herein.

2. Except as otherwise stated herein, it is understood and agreed by the PBA, in exchange for the consideration related herein, that, upon execution by it of this Agreement, the PBA releases and forever discharges Dawson, its officers, directors, affiliates, subsidiaries, insurers, sureties, agents, servants, employees, attorneys and parent companies of any and all claims, demands, actions, causes of action, at law or in equity, of whatsoever kind or nature, including any and all claims alleged, or which could have been alleged, in the Suits or otherwise related to the Project.

3. The release provided by the PBA in Paragraph 2 above specifically excludes the PBA's claims against any entity other than Dawson working on the Project. The release provided by the PBA further excludes any claims assigned to it against parties other than Dawson. Any such releases must be separately negotiated and supported by separate consideration.

4. Except as otherwise stated herein, it is understood and agreed by Dawson, in exchange for the consideration related herein, that upon execution by it of this Agreement, it releases and forever discharges the PBA, its employees, individually and collectively, and, as applicable, each of its boards, authorities, commissions, committees, and departments, each of its elected or appointed officials, supervisors, employees, agents, members, directors, officers, and insurers including any and all claims alleged, or which could have been alleged, in the Suits or otherwise related to the Project.

5. The release provided by Dawson in Paragraph 4 above specifically excludes Dawson's claims against designers and subcontractors working on the Project. The release provided by Dawson further excludes any claims assigned to it against parties other than the PBA, whether in whole or in part, and excludes any claims submitted on behalf of the Contested Subcontractors or Party Subcontractors and on whose behalf Dawson submitted TfC claims against the PBA in the Suits. The PBA agrees that Contested Subcontractors and Party Subcontractors that have asserted claims through Dawson against it can continue to pursue on their own those claims against the PBA as they are hereby given by Dawson that right to assert such claims. The PBA disputes the validity of the Contested Subcontractors' and Party Subcontractors' claims, but the PBA agrees not to raise any defense claiming that the Contested Subcontractors' or Party Subcontractors' claims are barred because a) the Contested Subcontractors or Party Subcontractors do not have privity with the PBA, or b) the Contested Subcontractors or Party Subcontractors delayed bringing the claims during the time period that Dawson was pursuing TfC claims. PBA agrees that any period of limitation concerning a claim by a Contested Subcontractor or Party Subcontractor is deemed to have been tolled from April 4, 2011 until January 15, 2015. The PBA consents to allow the Contested Subcontractors and Party

Subcontractors to pursue claims for non-payment related to work on the Project, only, directly against the PBA. The Parties agree that the PBA shall be solely responsible for all claims brought by the Contested Subcontractors or Party Subcontractors for non-payment related to work on the Project; and Dawson, having accepted no consideration for those claims in this Agreement, will have no obligation or responsibility with respect to such claims as a result of this Agreement. Releases for assigned claims, or claims asserted by the Contested Subcontractors or the Party Subcontractors must be separately negotiated and supported by separate consideration.

6. The Parties to this Agreement further agree that the terms of this Agreement will be binding on their parents, their subsidiaries, affiliates, predecessors-in-interest, successors-in-interest, insurers, reinsurers, sureties, officers, directors, employees, agents, attorneys, representatives, shareholders and all other manner of persons and/entities acting by, through and/or with them.

7. The settlement between Dawson and the PBA memorialized by this Agreement is expressly subject to and contingent upon approval by the PBA, and Huntsville City Council at a regularly-scheduled public meeting. As such, the obligations of the PBA and Dawson under this Agreement shall not be deemed final, operative, binding, or enforceable until such time as the Huntsville City Council and PBA, by majority vote, pass a resolution approving the settlement. In the event the Huntsville City Council or the PBA declines to approve the settlement, the Agreement is null and void in all respects.

8. This Agreement is executed and delivered within the State of Alabama and will be construed in accordance with and governed by the laws of the State of Alabama.

9. The Parties agree that should any provision of this Agreement be found to be ambiguous in any way, such ambiguity shall not be construed in favor of or against any party to this Agreement, but rather the terms of this Agreement shall be construed fairly and reasonably in a manner to effectuate the intentions of the parties hereto.

10. The Parties participated equally in the negotiation and drafting of this Agreement. No inference shall be drawn that this agreement was prepared by any particular party, and no ambiguity shall be construed against any particular party.

11. The Parties to this Agreement, further understand and agree that neither the terms of this Agreement, nor the execution of this Agreement, will be construed as an admission of liability whatsoever by any party to this Agreement. This Agreement is intended to resolve disputed claims with each of the Parties denying any liability to the other.

12. The Parties represent and warrant that, except as otherwise acknowledged in writing by them, there has been no assignment, subrogation, or any other transfer of any interest in anything herein, and if any party to this Agreement has made such an assignment, subrogation, or any other transfer, the party to this Agreement who has made such an assignment, subrogation, or transfer, or who has purported to release claims in which any person or entity has a valid lien interest, hereby agrees to defend, indemnify and hold any other party to this Agreement harmless from any claims and/or liens, including costs, expenses and attorneys' fees that are incurred as a result of any person or entity asserting any such lien assigned, surrogate, or otherwise transferred claim. It is the intention of the Parties that the indemnity referenced in this paragraph does not require payment on a settlement or judgment as a condition precedent to recovery by the party to be indemnified.

13. The Parties have read and understand each of the terms and conditions of this Agreement.

14. Each of the persons executing this Agreement hereby represents and warrants that each is are fully authorized to execute this Agreement on behalf of the party for which he or she is acting.

15. The Parties hereby acknowledge that they execute this Agreement of their own free will and are under no threat, menace, coercion or distress, whether economic or physical, from any party to the Agreement. The Parties further acknowledge that they execute this Agreement acting on their independent judgment and upon advice of their respective counsel without any representation, express or implied, from any party except as set forth herein.

16. Should suit be brought to enforce or interpret any part of this Agreement, the substantially prevailing party shall be entitled to recover as an element of costs of suit and not as damages, reasonable attorneys' fees to be fixed by the court, regardless of whether such suit proceeds to final judgment.

17. No breach of any provision of this Agreement can be waived unless done so in writing by the waiving party. The waiver of any one breach shall not be deemed to be a waiver of any other breach of the same or any other provision of this Agreement.

18. This Agreement may be amended only by a written agreement executed by the parties-in-interest at the time of the modification.

19. This Agreement may be executed in one or more counterparts and, when executed by each of the Parties, said counterparts shall constitute a single agreement.

20. This Agreement consisting of 13 pages, including signature pages, is made and executed on the date(s) set forth below and is effective as of the latest date of execution by any

party hereto or approval by the PBA or City Council of the City of Huntsville, Alabama, whichever comes last (the "Effective Date").

(SIGNATURES ON NEXT PAGE)

The Public Building Authority of the City of
Huntsville, Alabama

By: _____

Its: _____

STATE OF ALABAMA)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind the Public Building Authority of the City of Huntsville, Alabama; and he is executing same voluntarily as his own free act.

GIVEN under my hand and seal this ____ day of _____, 2014.

[SEAL]

Notary Public
My commission expires on:

Dawson Building Contractors, Inc.

By: _____

Its: _____

STATE OF _____)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind Dawson Building Contractors, Inc.; and he is executing same voluntarily as his own free act.

GIVEN under my hand and seal this ____ day of _____, 2014.

[SEAL]

Notary Public
My commission expires on:

CITY OF HUNTSVILLE, ALABAMA

By: _____

Its: MAYOR

STATE OF _____)

)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared **Tommy Battle, Mayor of the City of Huntsville, Alabama**, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind the City of Huntsville, Alabama, pursuant to a valid resolution passed by the City Council of the City of Huntsville, Alabama; and he is executing same voluntarily as his own free act.

Notary Public

My Commission Expires: